Petrochem Insulation, Inc. Employer *and* International Association of Heat & Frost Insulators & Asbestos Workers, Local 5, AFL–CIO *and* International Union of Petroleum and Industrial Workers. Case 21–RC–20619

March 24, 2004

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held by mail ballot from June 4, 2003 to June 18, 2003, and manual polling on June 26, 2003, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 14 ballots for the Petitioner, 71 for the Intervenor, and 0 ballots cast against the participating labor organizations. There were 16 challenged ballots, an insufficient number to affect the result.

The Board has reviewed the record in light of the exceptions and briefs, has decided to adopt the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction of Second Election, and finds that the election must be set aside and a new election held.

Petitioner's Objection 2 alleges that the Employer interfered with the election by threatening the loss of wages and benefits if employees voted for the Petitioner. Contrary to the hearing officer's recommendation, we shall sustain the objection.

The facts are not in dispute. The Employer issued a memo to all employees on June 3, 2003. In pertinent part, that memo stated:

> "Local 5 says Petrochem does not want you to vote for Local 5. We don't. Petrochem does not want to lower your wages and benefits and have 2 Union contracts that discriminate against the employees. Petrochem wants all employees to be treated the same."[1]

The hearing officer found that this statement was not objectionable because it was merely an expression of the Employer's desire to maintain the status quo and because the Petitioner did not show that employees viewed the statement as a threat. We disagree.

As noted, the Employer has a contract with the Intervenor. The record does not expressly disclose whether the employees represented by the Intervenor currently earn more, the same, or less than the employees sought by the Petitioner. However, the implicit suggestion of the Employer's memo is that all employees are now treated the same, and that a vote for the Petitioner would change that because a separate Petitioner contract would provide for lesser amounts and would thereby "discriminate" against those employees.

The Employer's memo—in particular the phrase "Petrochem does not want to lower your wages and benefits"—clearly implied to employees that if they successfully voted in the Petitioner, the Employer would reduce their wages and benefits. Nothing in the memo disavows or contradicts this implication. The memo explicitly declared the Employer's opposition to the Petitioner and linked that opposition to its own prospective actions. Although the lowering of wages and benefits referred to an anticipated collective-bargaining agreement with the Petitioner, it would not constitute a prediction of adverse consequences that was both beyond the Employer's control and based on objective facts. See generally *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618–619 (1969). In addition, the hearing officer improperly focused on the employees' subjective reactions to the Employer's statement. The Board has long held that the test for objectionable conduct is an objective one and that the subjective reactions of employees are irrelevant. See, e.g., *G.H. Hess, Inc*., 82 NLRB 463 fn. 2 (1949); *Hopkins Nursing Care Center*, 309 NLRB 958, 958 fn. 4 (1992) (collecting cases). In this case, the issue is whether the statement can be reasonably understood to threaten the loss of wages or benefits. We believe that the employees could reasonably interpret the Employer's statement as a threat that if the Petitioner won, they would face reduced wages and benefits. Accordingly, we sustain the Petitioner's Objection 2 and set aside the election.[2]

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to

[1] The Employer's language regarding "2 union contracts" reflects the fact that the Intervenor represents the Employer's employees nationally. Therefore, a victory for the Petitioner in the petitioned-for unit would eventually require the negotiation of two separate collective-bargaining agreements.

[2] Because we sustain Objection 2, we find it unnecessary to pass on the hearing officer's recommendation that the Board overrule Objections 1 and 3.

the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Association of Heat & Frost Insulators & Asbestos Workers, Local 5 or by International Union of Petroleum and Industrial Workers, or by neither.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. March 24, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD